PREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 321

FRANK J. RAGEN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Appellate District, State of California.

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Opinion Below.

The opinion of the State Court of Appeal is reported in 262 Adv. Cal. App. 396, 68 Cal. Rptr. 700. It is printed in Appendix I to this petition.

Jurisdiction.

1. The jurisdiction of this Court is invoked to review a final decision of the highest court of the State in which a decision could be had, on the ground that there was drawn in question a right, privilege and immunity claimed by the petitioner under the Constitution of the United States, in that material evidence, admitted against the petitioner, was obtained and used by the State in violation of petitioner's right to be secure from unreasonable searches and seizures, and in violation of his right not to be deceived into involuntarily

incriminating himself, and in violation of his right to be informed of his rights to silence and counsel.

2. The date of the judgment sought to be reviewed, as well as the time of its entry, was May 22, 1968. It became final below on July 21, 1968. [See, *California Rules of Court*, rules 24(a), 28(a); *West's Annotated California Codes*, vol. 23, part 1, rules 24(a), 28(a).[1]]

3. A timely petition for rehearing was filed in the State Court of Appeal on June 6, 1968, and denied, without opinion, on June 20, 1968. A timely petition for a hearing in the State Supreme Court after decision by a Court of Appeal, was filed in the Supreme Court on June 28, 1968 and denied by that Court, without opinion, on July 17, 1968.

4. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. Code, § 1257(3).

Questions Presented.

1. Is it an unreasonable search and seizure, under the Fourth Amendment to the Constitution of the United States, as interpreted in *Katz v. United States*, 389 U. S. 347, and *Berger v. New York*, 388 U. S. 41, surreptitiously and by electronic means, to intercept and record telephone conversations between the defendant (upon whom suspicion had then definitely focused) and a police agent (but not disclosed to the suspect to be

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[1]The rules cited, so far as material here, read as follows:

"RULE 24. (a) . . . A decision of a Court of Appeal becomes final as to that court 30 days after filing . . .

* * *

"RULE 28. (a) Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court . . . may order the cause transferred to itself for hearing and decision . . ."

acting as a police agent), which conversation the suspect believed and had the right to believe was private?

2. When in the course of such conversations incriminating statements or admissions are obtained by means of deception and false representations (*i.e.*, by suppressing the fact that the purported telephone calls were in reality an accusatory interrogation by the police, and by the false representation that the police were not involved), are the statements and admissions involuntary within the meaning and effect of the Due Process Clause of the Fourteenth Amendment, even though the deception did not necessarily tend to produce untrue statements?

3. When police and prosecutorial officers of the State, for the admitted purpose of eliciting incriminating statements, undertake a telephonic interrogation of one upon whom suspicion of commission of a crime has definitely focused, and whom the officers have decided to arrest, has such a critical stage been reached as to require that the suspect be informed of his constitutional rights to silence and the presence and assistance of counsel?

Constitutional Provisions and Statutes Involved.

1. The Fourth Amendment to the Constitution of the United States, reading as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fourteenth Amendment to the Constitution of the United States, section 1, reading as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code:

(a) "§261. Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

"1. Where the female is under the age of eighteen years.

* * * *

4. Where she is prevented from resisting . . . by any intoxicating, narcotic, or anaesthetic, substance admitted by or with the privity of the accused." [California Statutes, 1913, c. 122, p. 212, §1.]

(b) §264. Rape is punishable by imprisonment in the state prison not less than three years, except where the offense is under subdivision 1 of Section 261 . . . in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than 50 years . . ." [California Statutes, 1923, 1st Ex. Sess., c. 23, §1.]

(c) "§288a. Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprison-

ment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year . . ." [California Statutes, 1955, c. 274, p. 729, §1.]

Statement of the Case.

1. The Facts Material to Consideration of the Questions Presented.[2]

Petitioner, a doctor of medicine [Rep. Tr. (VII), p. 2027, lines 13-24], was convicted of sex crimes [*Cal. Penal Code*, secs. 261, 288a, pp. 4-5, *supra*], allegedly committed, several years apart, against two of his female patients.[3] One of the patients, Diane, com-

[2]The following abbreviations are used in this petition, in referring to the record:

"*Clk. Tr.*"—Clerk's Transcript.

"*Rep. Tr.*"—Reporter's Transcript.

Because the Reporter's Transcript is here in eleven volumes, we indicate the number of the volume referred to by the parenthetical Roman numeral in the reference.

[3]The evidence summarized in this Statement is that presented by the prosecution. We do not touch the defense at all, except to say that it was a strong one; the jury deliberated for five days before reaching a verdict. [Rep. Tr. (X), p. 2877, line 1; p. 2930, lines 15-25; p. 2994, lines 1-10.] The petitioner unequivocally denied the charge [Rep. Tr. (VII), p. 2057, lines 15-25; p. 2076, line 24, to p. 2077, line 9]; a thorough and complete medical examination of Diane, the prosecutrix who complained shortly after the alleged offense, made less than three hours later, by a doctor selected by the police, showed no sign of recent sexual intercourse. [Rep. Tr. (II, III, IV), p. 327, lines 5-14; p. 339, line 11, to p. 341, line 21; p. 552, line 6, to p. 553, line 18; p. 742, line 3, to p. 744, line 10; p. 970, line 16, to p. 972, line 10; p. 974, line 5, to p. 976, line 12; p. 982, line 4, to p. 998, line 24.] Five other doctors testified, without contradiction, that if sexual intercourse had taken place when and as related by Diane, some signs of it would usually be found, so soon afterwards, about the female genitalia; and, if no such signs were found, their professional opinion would be that sexual intercourse had not taken place. [Rep. Tr. (V, VI), p. 1429, line 26, to p. 1433, line 7; p. 1481, line 23, to p. 1482, line 22; p. 1539, line 8, to p. 1542, line 13; p. 1579, line 13, to p. 1580, line 17; p. 1602, line 11, to p. 1604, line 24; p. 1618, line 12, to p. 1620, line 18.]

plained to the police. [Rep. Tr. (IX), p. 2495, lines 4-6; p. 2497, line 6, to p. 2533, line 25.] After hearing her story, the police determined, subject to consultation with the prosecutor's office the next day, to arrest petitioner. [Rep. Tr. (II), p. 326, line 25, to p. 327, line 26; p. 339, line 11, to p. 344, line 2; p. 352, line 11, to p. 353, line 16.] During the consultation with the prosecutor it was decided that an effort would be made to elicit incriminating statements from petitioner, by having Diane carry on an accusatory interrogation of him over the telephone. [Rep. Tr. (II), p. 344, line 13, to p. 345, line 16; p. 354, line 26, to p. 355, line 6; p. 382, lines 18-22; p. 383, lines 14-22; p. 389, lines 17-24.]

The consent and cooperation of Diane and her parents having been obtained, the necessary arrangements were made by the police to carry the planned interrogation into effect. The telephone in Diane's home was tapped and connected to a tape recorder. [Rep. Tr. (II), p 328, line 1, to p. 330, line 7; p. 335, line 23, to p. 336, line 3; p. 344, line 2, to p. 345, line 18; p. 353, line 20, to p. 356, line 25; p. 357, line 25, to p. 361, line 18.] A series of questions to be put by Diane to the petitioner was prepared by the prosecutor and police officers and submitted to Diane, who was instructed by them to call petitioner and ask him the prepared questions. She did so; and in addition, asked several questions suggested by the officers while she was talking to petitioner. The questions were strongly accusatory in tenor; and were obviously designed for their "shock effect." Diane was acting throughout "in response to the specific request of the police department" to do precisely what she was doing; and, in fact was

being supervised and directed by the police as the calls were in progress.[4] [Rep. Tr. (II), p. 329, line 4, to p. 330, line 7; p. 334, line 18, to p. 335, line 13; p. 344, line 12, to p. 347, line 15; p. 358, line 2, to p. 363, line 20; p. 369, line 9, to p. 370, line 11.] The intended purpose of this operation, the prosecutor involved in it admitted, was "to engage in a process of interrogation of the Doctor designed to elicit from him statements which may have incriminated him in connection with the charges . . ." [Rep. Tr. (II), p. 382, line 18, to p. 383, line 19.]

There were two telephone conversations between Diane and the petitioner. In the first one petitioner, bringing it to a close, because he was being called for a surgical engagement, was asked by Diane to call back. He said he would. [Rep. Tr. (II), p. 415, line 16, to p. 416, line 4.] He did so, but in the interval the police officers played the tape for the prosecutor, who was not pleased with the results. He thought there still were things in it that could be explained. [Rep. Tr., p. 329, lines 10-22; p. 363, line 3, to p. 370, line 23.] The officers, therefore, waited for the second call which came through in the afternoon. It too was intercepted and taped. [Rep. Tr. (II), p. 366, line 4, to p. 369, line 3.]

Petitioner was not told at any time that he was being subjected in fact to an interrogation by the police,

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[4]As a consequence of the nature and extent of the police and prosecutorial participation in and direction of Diane's activities, there is no doubt that she was acting as an agent or instrumentality of the police; and that her conversations with petitioner were realistically and in law a police interrogation. [*People v. Tarantino*, 45 Cal. 2d 590, 595, 290 P. 2d 505, 509; *People v. Rogers*, 22 Cal. 2d 787, 805, 141 P. 2d 722, 731; *Corngold v. United States*, 9 Cir. (*en banc*), 367 F. 2d 1, 4-6.]

or that he had a constitutional right to remain silent and to have the presence and assistance of counsel. To the contrary, he was falsely assured that no complaint had been made to the police. No warrant for this search was had from any magistrate or other neutral authority. [Rep. Tr. (II), p. 418, line 22, to p. 419, line 8; p. 425, lines 5-8.]

These recorded conversations, over petitioner's continuing objection [Rep. Tr. (II), p. 215, lines 3-25; p. 226, line 26, to p. 227, line 14; p. 337, line 4, to p. 338, line 9; p. 391, line 5, to p. 398, line 25; and see, Appendix II, pp. 16-17, *infra*], were twice heard in their entirety by the jury; and in substantial part a third time. Also, a stenographic transcription of them was supplied each juror.[5] [Rep. Tr. (II, VIII, X), p. 402, lines 19-21; p. 404, line 13, to p. 407, line 6; p. 2109, line 20, to p. 2110, line 14; p. 2124, line 11, to p. 2125, line 7; p. 2935, line 1, to p. 2937, line 10.] The conversations were characterized by the court below as incriminating, being ones in which petitioner, at first, "denied everything with an occasional incriminating slip" but, in which later, be in substance "emotionally admitted his crime . . ." [262 Adv. Cal. App. at 401, 68 Cal. Rptr. at 702; Appendix I, p. 2, *infra*.]

The State Court of Appeal entertained but rejected petitioner's contentions that these statements were inadmissible, because obtained by unconstitutional means; *i.e.*, by an unreasonable search and seizure violative of the Fourth Amendment, as that Amendment was construed by this Court in *Katz v. United States, supra,* 389 U. S. 347 and *Berger v. New York, supra,* 388

[5]The impact upon the jury of the repetitious hearing of the recording of the statement seems obvious.

U.S. 41; and, as well, by deception, and without the giving of an *Escobedo* or *Miranda* type warning. [See, 262 Adv. Cal. App. at 401-403, 68 Cal. Rptr. at 702-704; Appendix I, pp. 3-6, *infra*.]

A petition to have the cause heard in the State Supreme Court after decision by a Court of Appeal, was seasonably filed. It was denied by the Supreme Court without opinion. The Court of Appeal, therefore, was the highest court of the State to which the cause could be taken. [*Hammerstein v. Superior Court*, 341 U. S. 491, 492. See, also, *Pacific Gas etc. Co. v. Police Court*, 251 U. S. 22, 24-25.]

2. Raising of the Federal Questions.

(a) It appears from the opinion of the State court that each of the questions here presented was considered and decided by that court. [See, 262 Adv. Cal. App. at 401-403, 68 Cal. Rptr. at 702-704; Appendix I, pp. 3-6, *infra*.] It is, therefore, "irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided . . ." [*Manhattan L. Ins. Co. v. Cohen*, 234 U. S. 123, 134. To the same effect: *Charleston Federal S. & L. Assn. v. Alderson*, 324 U. S. 182, 185-186. See, also, *Swain v. Alabama*, 380 U. S. 202, 222 (note 30); and, compare, *Ungar v. Sarafite*, 376 U. S. 575, 582-583.] In respect of the questions here presented, the State court in its opinion said:

> "Attacking the trial court's admission of his telephone conversation with Diane, Regan makes three unmeritorious contentions.
>
> "1) Ragen contends tape recording his telephone conversations with Diane constituted an un-

reasonable search and seizure. Relying on *Katz v. United States*, 389 U. S. 347 . . . and *Berger v. State of New York*, 388 U. S. 41 . . . Ragen correctly argues tape recording a telephone conversation is a search within the Fourth Amendment to the United States Constitution. The Fourth Amendment protects against *unreasonable* [court's italics] search and seizure. Neither *Katz* nor *Berger* dictates whether tape recording a telephone conversation is unreasonable where one party to the conversation consents to the recording . . . [262 Adv. Cal. App. at 401, 68 Cal. Rptr. at 702-703; Appendix I, p. 3, *infra.*]

"2) Ragen contends his telephone statements to Diane were involuntary because Diane's questions and accusations deceived him and incited fear and panic . . . Deception, however, does not render statements inadmissible if it is not of a type reasonably likely to procure an untrue statement . . . We are convinced the deception practiced here, Diane's not telling Ragen about the police recording the planned questioning, was not reasonably likely to procure an untrue statement . . . [262 Adv. Cal. App. at 402-403, 68 Cal. Rptr. at 703; Appendix I, pp. 4-5, *infra.*]

"3) Ragen contends his telephone statements to Diane were inadmissible because before taping them the police did not warn him of his constitutional rights as stated in *Miranda v. Arizona*, 384 U. S. 436. Conceding he was not in custody or under arrest when the police recorded the conversations, Ragen argues custody is not an indispensable requirement before a *Miranda* warning is required

> . . . Ragen was not deprived of his freedom of action in any significant way. He could have hung up. He did not have to call Diane. His statements, therefore, were admissible, considering the totality of circumstances, although he had not been warned of the *Miranda* rights . . ." [262 Adv. Cal. App. 2d 403, 68 Cal. Rptr. at 703-704; Appendix I, pp. 5-6, *infra.*]

(b) Petitioner's opposition to the use in evidence of the taped recordation of the intercepted telephone calls took two general forms.

First, in addition to testimony otherwise adduced, there was extensive *voir dire* examination of the witnesses who identified the tape, for the purpose of putting into the record the facts relating to the circumstances in which it was made. [Rep. Tr. (II), p. 331, line 15, to p. 338, line 9; p. 339, line 1, to p. 370, line 23; p. 377, line 19, to p. 387, line 9.] The evidence in this regard is appropriately summarized at pages 6-8, *supra.*

Second, there was a statement of the general grounds of petitioner's objection to use of the tape in evidence.[6] That objection was made at the first practicable opportunity. Even before the prosecution's opening statement was made, the trial court was informed there would be an objection to admission or use of the tape recording. [Rep. Tr. (I), p. 215, line 3, to p. 216, line 1. Appendix II, *infra* p. 16.] When the existence of the tape was first mentioned in the prosecution's opening statement, petitioner's rights in respect of it were re-

[6]The portions of the record relied on in this respect are voluminous. They are, therefore, included in Appendix II to this petition.

served.[7] [Rep. Tr. (I), p. 227, line 24, to p. 228, line 17. Appendix II, *infra*, p. 17.] And, after the tape had been identified and the circumstances of its making brought out, a lengthy objection to it was made. [Rep. Tr. (II), p. 332, line 5, to p. 333, line 3; p. 391, line 3, to p. 398, line 25; p. 404, lines 13-19.] The substance of the objection, so far as here relevant, was that in talking to Diane, petitioner was talking with an agent of the prosecutorial authorities at a time when inquiry had certainly focused upon him [Rep. Tr. (II), p. 392, line 25, to p. 393, line 6]; that the rule of *Escobedo*, *Miranda* and *Massiah*, therefore, was, applicable, notwithstanding the absence of custody at the time[8] [Rep. Tr. (II), p. 393, line 18, to p. 398, line 13]; and that the recording had not been made in compliance with the requirements of Federal and State law.[9] [Rep. Tr. (II), p. 398, lines 16-22. Appendix II, *infra*,

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[7]The tape and its admissibility had already been the subject of informal discussions and "debate" in Chambers between counsel and the trial Judge. [Rep. Tr. (II), p. 391, lines 18-21.]

[8]The reference here, as the context shows, was to *Escobedo v. Illinois*, 378 U. S. 478; *Miranda v. Arizona*, 384 U. S. 436; and *Massiah v. United States*, 377 U. S. 201.

[9]This ground, which adumbrates the *Berger-Katz* question [see, p. 2, *supra*], was made in general terms. It could not then have been more specific, as it was made 2½ years before *Berger* and 3 years before *Katz* were decided. *Olmstead*, *supra*, 277 U. S. 438, which very likely would have made the Fourth Amendment objection a fruitless one, was then still in the ascendancy. Petitioner was not bound to anticipate that the *Olmstead* case would be overruled; but, as soon as it was, the specific point was made in and entertained by the State Court of Appeal. In those circumstances, the federal question was "raised at the first opportunity . . ." [*Brinkerhoff-Faris Tr. etc. Co. v. Hill*, 281 U.S. 673, 676-678; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 319-320.]

pp. 18-24.] The objection was overruled. [Rep. Tr. (II), p. 398, line 26, to p. 404, line 23.]

Reasons for Allowing the Writ.

The allowance of a writ of certiorari is sought in this cause for the reason that the State court has decided federal questions of substance in a way that is not in accord with applicable decisions of this Court. The questions are important for they relate directly to frequently employed methods of investigating the commission of crime and the bringing of accusations thereof. They are methods that can be and are administered, contrary to the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment, in such a way as materially to abridge the rights of persons accused or suspected of having committed a criminal offense, and as to subvert the fairness of their trial. The decision below approves the use of such methods in the State of California; and furnishes a precedent for other states to follow; but it conflicts with decisions of United States Courts of Appeals.

ARGUMENT.

I.

An Unwarranted Search and Seizure by Police, Which Invades the Defendant's Personal Privacy, Is Not Made Lawful by a Stranger's Consent to the Invasion, Especially When the Stranger Is a Police Agent.

First: In *Katz v. United States,* 389 U.S. 347, coming shortly after and enlarging upon *Berger v. New York,* 388 U. S. 41, this Court made it certain that a telephone conversation is within the protection of the Fourth Amendment; and that electronic interception of it is a search and seizure which, if made without a warrant or equivalent interposition of a neutral or impartial authority, is *per se* unreasonable. The State Court evaded this rule in a way that nullifies it in its application to a conversation to which one of the parties is a police agent. That court, acknowledging that under *Katz* and *Berger* "tape recording is a search within the Fourth Amendment to the United States Constitution," nonetheless held that the search here involved was not unreasonable, because one of the parties to it—the police agent, *not* the accused—had "consented" to it. [262 Adv. Cal. App. at 401, 68 Cal. Rptr. at 702-703; *Appendix,* pp. 3-4, *infra.*] That escape from the authoritative force of *Katz* and *Berger* is not consonant with the rationale of those cases.

It has long been true that what is "at the core of the Fourth Amendment" is "the security of one's privacy against arbitrary intrusion by the police . . ." [*Berger v. New York, supra,* 388 U. S. at 53; *Wolfe v. Colorado,* 338 U. S. 25, 27] This means, as was emphatically pointed out in *Katz, supra,* 389 U. S. at

351, that the "Fourth Amendment protects people not places . . ." Obviously, if it is one's privacy that is protected "against arbitrary intrusion by the police," it is not for the police or one of their agents to waive that privacy and permit or "consent" to its being intruded upon. [*Cf., United States v. Blok,* D.C. Cir., 188 F. 2d 1019, 1021; *People v. Cruz,* 61 Cal. 2d 861, 866-867, 395 P. 2d 889, 892-893, 40 Cal. Rptr. 841, 844-845; *Tomkins v. Superior Court,* 59 Cal. 2d 65, 68, 378 P. 2d 113, 116, 27 Cal. Rptr. 889, 892.]

A telephone conversation between two persons, one of whom, unknown to the other, is a police agent, is as to the non-police party, one from which he intends to exclude the "uninvited ear." It is and should be just as much within the protection of the Fourth Amendment as one between wholly private persons. The criterion of protectability in this connection is not the identity or status of the talkers, but the intention of the one against whom the results of the search are sought to be used. The protection is given precisely because the call is, or is rightfully believed to be, a private one, which in fact is heard only by those known to be parties to it. It is, therefore, as to the one so believing and intending, entitled to be heard by no one else other than those who have satisfied a magistrate or other neutral authority of the overriding necessity for intruding upon it. [*Katz v. United States, supra,* 389 U.S. at 351-352, 359.] To permit that privacy to be invaded, simply with the consent of those whose invasion the Amendment seeks to prevent, is, we submit, to eviscerate the Amendment. Nothing in *Katz* or *Berger* calls for or permits any such ready stultification of the principle they expound and enforce.

The importance of the question posed by the State court's decision is, we think, self evident. Use of an informant to elicit incriminating statements from one suspected of crime, is a common device. But, like any other device or stratagem of enforcement designed to accomplish the same purpose, it must be employed within the limits set by this Court's interpretation of the Constitution. Brute force, psychological coercion and trickery and deception are also effective devices to elicit incriminating statements and bring a suspected offender to book. They are proscribed. [See, cases cited, p. 19, *infra.*] So is arbitrary intrusion upon privacy by the police. No more in the latter case than in the others may the limitations of the Constitution be evaded at the mere will of those whose official conduct it is the purpose of those limitations to hold in appropriate check.

Second: The State court believed it had support, in *Hoffa v. United States,* 385 U. S. 293, and *Lopez v. United States,* 373 U.S. 427, for its formulation of an exception to *Katz.* [See, 262 Adv. Cal. App. at 401-402, 68 Cal. Rptr. at 702-703; Appendix I, pp. 3-4, *supra.*] We may assume for argument's sake that the court below correctly read those two decisions.[10] That very fact

[10]The differences of the instant case from *Hoffa* and *Lopez* are many and significant. First, neither *Hoffa* nor *Lopez* was concerned with the question whether one's constitutionally protected privacy could be waived by another. Second, in each of them what was involved was not interception and use of a private conversation by the "uninvited ear," but its repetition by one with whom it was freely had and who, it was mistakenly assumed, would not repeat it. At bar the reliance, justifiable as *Katz* determines [389 U. S. at 351-352, 359], was on the fact

(This footnote is continued on the next page)

suggests the need for an inquiry by this Court into the question whether *Berger* and *Katz* have left any vitality in *Hoffa* and *Lopez*. The latter cases owe a large part of such vitality as they may have had, to the point of view fostered by *Olmstead v. United States*, 277 U. S. 438. *Olmstead* "and its offspring" [see, *Berger v. New York, supra*, 388 U.S. at 64, Douglas, J., concurring], have been shorn of their force by *Katz* and *Berger*; and a different point of view, more nearly like that of the dissent of Mr. Justice Brandeis in *Olmstead*, has emerged. [See, *Katz, supra*, 389 U. S. at 352-354; *Berger, supra*, 388 U.S. at 51-53, 58-60, 64.]

Third: Other courts have not found any exception to *Katz* based on the waiver or consent of another to an invasion of one's constitutionally protected privacy. For example, in *United States v. White*, 7 Cir. (March 18, 1968), ... F. 2d ....., 36 U.S.L.W. 2613, *Katz* was applied to make inadmissible surreptitiously made recordations of conversations between the defendant and a government informer, notwithstanding the obvious

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that no uninvited ear was listening. [See, p. 8, *supra*.] Third there was no surreptitious interception or seizure of a telephone conversation reasonably believed to be private. Indeed, in *Hoffa*, there was no recordation at all. Fourth, the recordation that was made or used in *Lopez*, was used merely to corroborate a party's testimonial repetition of it. There it was the "invited ear" that did the testifying; here it was the "uninvited" one, as Diane did not herself testify to the content of the calls; she merely testified to the making and the authenticity of the recordation. [Rep. Tr. (II), p. 328, line 12, to p. 330, line 7; p. 334, line 18, to p. 337, line 1.] Fifth, the validity of *Olmstead* and the line of cases it engendered was not questioned. [See *e.g., Lopez, supra*, 373 U.S. at 438-439.]

fact of the informer's consent. Indeed, because of that consent Circuit Judge Castle dissented, thus emphasizing the point of the decision.

The same Court of Appeals, in *United States v. Hagarty,* 388 F. 2d 713, readily applied *Katz* to an eavesdropped recording of a conversation between the defendant and another in the latter's government office. The key to the problem, the court pointed out, was not that the conversation was had in a public office, but the fact that the defendant sought to exclude the uninvited ear. [388 F. 2d at 716.] Such surveillance, without the consent of *both* parties, was "out of harmony with present-day enforcement procedures." [388 F. 2d at 718.]" . . . Nothing in *Katz,* the court continued, "supports the carving out of an exception to the Fourth Amendment's requirements in the circumstances of this case."[11] [388 F. 2d at 719.]

In *Doty v. United States,* 10 Cir. (June 4, 1968) .... F. 2d ...., it was held that a taped recording of a telephone conversation between the defendant and an undercover agent was inadmissible under *Katz,* notwithstanding the agent's consent.

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[11]A petition for a hearing in bank was filed by the Government in *White* and granted. The hearing was had on September 11, 1968. The cause is now [September 30, 1968] under submission. In *Doty,* p. 18, *infra,* although the time within which the Government could file a petition for rehearing was extended to July 20, 1968, none was filed.

II.

The Constitution Bans Use of Self-Incriminatory Statements Induced by Police Deception, Whether or Not the Deception Tends to Produce Untrue Statements. The State Court Refused to Follow That Rule.

Having regard to such decisions as *Leyra v. Denno,* 347 U.S. 556, 571, *Spano v. New York,* 360 U. S. 315, 320-324, and *Rogers v. Richmond,* 365 U. S. 534, 540-541, there can be no legitimate doubt that a confession or admission induced by deception is as involuntary as one produced by physical or mental coercion. Such a confession or admission is inadmissible if "not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth . . ." [*Rogers v. Richmond, supra,* 365 U. S. at 543-544.] In the instant cause the court below did not evince the "complete disregard" enjoined by this Court's interpretation of the Constitution. To the contrary, the State court held the statements admissible precisely because the deception by which they were induced "was not reasonably likely to procure an untrue statement . . ." [See, p. 10, *supra.*]

Thus, at least so far as the large and populous State of California is concerned, the road has been cleared for the regular use of deception and trickery to obtain self-incriminatory statements from those suspected of crime, so long as the deception practiced is not likely to produce untrue statements. Uniformity in the interpretation and application of the Constitution's proscription of involuntary confessions or admissions, if nothing else, calls for review of a decision so flatly nugatory of the supremacy of the United States Constitution as interpreted by this Court.

III.

Because a Critical Stage Had Been Reached, Interrogation During Which Could and Would Be as Apt to Subvert Trial Rights as a Custodial Interrogation, Petitioner, While Being Subjected to a Police Interrogation, Even Though Not Then in Technical Custody, Was Entitled to Be Informed of His Constitutional Rights to Silence and the Presence and Assistance of Counsel.

No doubt, in relation to the right, as a precondition to a lawful police interrogation, to be informed of one's constitutional rights to silence and the presence and assistance of counsel, the cases so far decided by this Court have dealt with custodial interrogations. That should not mean that the line is forever or inexorably drawn at that point. Conceivably, an interrogation of one not then technically in custody or under arrest, may in some circumstances produce the same undesirable consequences as if the interrogation were a custodial one. When that is the case, and since it is the purpose of the rule to prevent those consequences, the rule should be the same as in the case of a custodial interrogation. The ultimate objective of the rule, it has been well said [79 Harvard Law Review 974], is "protection of the individual's trial rights from pretrial subversion by unfair methods . . ." That subversion may be as effectively accomplished by an interrogation carried on at a critical stage—*i.e.*, when suspicion has definitely focused on the one being interrogated, the purpose is to elicit incriminating statements, and the suspect's arrest is imminent—as if it were carried on a few

moments later in conjunction with an expression of the ritualistic formula of arrest.[12]

The proposition that the purpose of the rule is to prevent unfair subversion of a defendant's trial rights is certainly implicit, if not indeed explicit, in the cases from this Court. The discussion in *Massiah* of the need for a defendant facing trial to have the protective assistance of counsel in the pre-trial stages of the prosecution, is pregnant with that proposition. [See, 377 U.S. at 204-205.] So, too, is the similar discussion in *Escobedo* [378 U.S. at 484-488], re-affirmed and re-emphasized, as it was, in *Miranda.* [384 U.S. at 466.] The need to prevent subversion of a trial's fairness by excluding improperly obtained confessions or admissions, has been derived by this Court, from the "totality of circumstances" in which the incriminating statements were obtained, not from the mere circumstance that some formal stage in the procedure looking to trial had been reached. [See, *e.g., Spano v. New York, supra,*

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[12]Indeed, evasion of the rule and subversion of one's trial rights become easier if custody or arrest is an indispensable condition. The same kind of interrogation that might have been conducted at the police station, may be conducted, and electronically recorded, in the suspect's home or office, or at the prosecutor's office to which he has been invited, not commanded or forced, to appear—all without a formal or explicit arrest or taking into custody. Many incriminating statements then gotten would not be gotten if the suspect were told that he was under suspicion, he would know, from the mere fact of being suspected or arrested, that he was in danger. Many times, therefore, he would not talk and would ask for his lawyer to be with him, just as he would do if he were in custody or under arrest and given the required warning. The need of a warning is just as great when the critical stage has been reached. The instant case is an example. Had petitioner known he was being subjected to a police interrogation it is not likely he would have talked at all; for he asked if a complaint had been made to the police, but was falsely answered in the negative. The inference is plain that had he known the true situation from the start, he would not have talked. [See, pp. 7-8, *supra.*]

360 U. S. at 323; *Massiah v. United States, supra,* 377 U.S. at 204.]

The need to protect the fairness of the ultimate trial is just as acute, the dangers of subversion of trial rights are just as great, when a "critical stage" in the process leading to trial has been reached, as it is when the police-station or jail-house door-sill is crossed. In the former posture of affairs, arrest and formal charge are virtually as certain as if already accomplished. In *Escobedo,* this Court extended the *Massiah* rule to one who, unlike *Escobedo,* had not been formally charged. That difference of fact, the Court said, "should make no difference . . . the investigation had ceased to be a general investigation of 'an unsolved crime.' . . . Petitioner had become the accused [but not formally so], and the purpose was to 'get him' to confess his guilt despite his constitutional right not to do so . . ."[13] [378 U.S. at 485.] The same reasoning calls for applying the rule to one who, even though not formally arrested, is reasonably sure to be, and, being accusatorily interrogated, needs protection of his trial rights.

The question whether the *Escobedo-Miranda* doctrine should be applied to a pre-custodial interrogation carried on after a critical stage has been reached, has an obvious importance in the administration, State and Federal, of

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[13]The quoted language closely fits the case at bar. [See, pp. 5-6, *supra.*] The police here were not "trying to solve a crime, or even to absolve a suspect . . : They were rather concerned primarily with securing a statement from the defendant on which they could convict him . . ." [*Spano v. New York, supra,* 360 U.S. 323-324.]

the criminal law. The logical analogy of the rationale of the doctrine lends substance to the question. These considerations suggest the desirability of review of the instant case, in order that plenary briefing and consideration may be given to this question.

Conclusion.

A writ of certiorari to the Court of Appeal, Fourth Appellate District, State of California, should be granted.

Respectfully submitted,

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APPENDIX I.

Opinion Below.

In the Court of Appeal, Fourth Appellate District, Division One, State of California.

Filed: May 22, 1968.

Frank J. Ragen appeals from a judgment of conviction entered after a jury found him guilty of raping a female under the age of eighteen years (Pen. Code, §261[1]), raping a female prevented from resisting by his having administered an intoxicating narcotic or anesthetic substance (Pen. Code, §261[4]), and two counts of sex perversion (Pen. Code, §288a).

As of May 26, 1966, Ragen, a general medical practitioner, was treating sixteen-year-old tonsillitis patient Diane. On that date, Diane appeared at Ragen's office at 5:40 p.m., as he had instructed her. No receptionist was there. No nurse was there. Although not required for treating tonsillitis, Ragen wanted to and recommended he perform a pelvic examination. Ragan injected Pentobarbital, a hypnotic drug, into Diane, and made her take two pills. She became weak and dizzy. Before long he had her take off her underclothing beneath her skirt. At his instruction she climbed onto an examination table, put her heels in stirrups extending out from the end of the table and pulled her buttocks all the way to the end of the table, leaving her extremely exposed. Ragen stood between her legs, jabbing his penis into her vagina. He then sat on a stool between Diane's legs and twice glided his tongue on her vagina. Later, Ragen told Diane he had to spray her throat. After taping her eyes with gause patches, he stood by the side of the table

and put his penis into her mouth, telling her to suck the lollipop.

Although dopey and weak when she got home, Diane telephoned a girl friend. Crying hysterically she explained what Ragen had done. The girl friend's mother called the police. Diane was taken to a Chula Vista hospital for tests. The tests did not confirm her story. Knowing Diane's story and the medical evidence casting doubt on it, the police were not about to arrest Ragen, a respected doctor. They suggested Diane telephone Ragen, accuse him, ask him questions they would prepare and let them record the conversation. Diane called Ragen about noon, May 27, 1966. For eight minutes he denied everything, with an occasional incriminating slip. Finally, he suggested he would call her back about 4:00 p.m. She agreed. At 5:40 p.m., Ragen called Diane. They spoke for fifteen minutes. In substance, Ragen emotionally admitted his crime, putting his life in her hands, asserting he would kill himself unless somehow she could charitably forgive him and keep her mouth shut.

The events described above led to Ragen's conviction for statutory rape, narcotic rape and one count of sex perversion. The other count of sex perversion involved five and one-half months pregnant Ruth. In June 1964, suffering cramps and contractions, Ruth telephoned Ragen, her doctor. He suggested meeting at his office at 10:00 p.m. Not surprisingly, no nurse was there. Ragen had Ruth get onto the examination table and put her feet into stirrups. He gave her an injection, making her dizzy, groggy, light-headed and drowsy. She fell asleep. She woke up finding Ragen standing between her legs, his penis penetrating

her vagina. Later, he tried to force his penis into her mouth.

Attacking the trial court's admission of the tape recording of his telephone conversations with Diane, Ragen makes three unmeritorious contentions:

1) Ragen contends tape recording his telephone conversations with Diane constituted an unreasonable search and seizure. Relying on *Katz v. United States,* 389 U.S. 347 [88 S. Ct. 507], and *Berger v. State of New York,* 388 U.S. 41 [87 S. Ct. 1873], Ragen correctly argues tape recording a telephone conversation is a search within the Fourth Amendment to the United States Constitution. The Fourth Amendment protects against *unreasonable* search and seizure. Neither *Katz* nor *Berger* dictates whether tape recording a telephone conversation is unreasonable where one party to the conversation consents to the recording. In *Hoffa v. United States,* 385 U.S. 293, 302 [87 S. Ct. 408, 413-414], the United States Supreme Court said:

> "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrong-doer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention less than four years ago in Lopez v. United States, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462."

Katz v. United States, supra, 389 U.S. 347 [88 S. Ct. 507], and *Berger v. State of New York, supra,* 388 U. S. 41 [87 S. Ct. 1873], to whatever extent they reflect displeasure with trespass and physical in-

vasion theories applied in *Olmstead v. United States,* 277 U.S. 438 [48 S. Ct. 564], and even *Lopez v. United States,* 373 U.S. 427 [83 S. Ct. 1381], do not diminish in the slightest the discussion of one party consent in *Hoffa v. United States, supra,* 385 U.S. 293, 302 [87 S. Ct. 408, 413-4141, and *Lopez v. United States, supra,* 373 U.S. 427 [83 S. Ct. 1381]. (Cf. *United States v. White,*[1] ..... F. 2d ..... [7 Cir. 1968] [U.S. Law Week April 9, 1968, Vol. 36, #39]. Ragen, in other words, took the chance Diane might publicize their conversation. The tape recording, with assured accuracy, merely told what Diane could say on the witness stand.

2) Ragen contends his telephone statements to Diane were involuntary because Diane's questions and accusations deceived him and incited fear and panic in him. As Ragen argues, the Fourteenth Amendment to the United States Constitution forbids using a mentally coerced confession in a state criminal trial (*Leyra v. Denno,* 347 U.S. 556 [74 S. Ct. 716]. *Rogers v. Richmond,* 365 U.S. 534 [81 S. Ct. 735]). Ragen cites as deception Diane's not telling him the police were recording the conversations. This deception he equates with mental coercion. Deception, however, does not render statements inadmissible if it is not of a type reasonably likely to procure an untrue statement (*People v. Arguello,* 65 Cal. 2d 768, 775; *People v. Hays,* 250 Cal. App. 2d 96, 98) and the police conduct is not such as (1) to overbear the will to resist, and (2) to bring about confessions not freely self-determined (*Rogers v. Richmond, supra,* 365 U.S. 534, 544 [81 S. Ct. 735, 741]). We are convinced

[1]Decision not final.

the deception practiced here, Diane's not telling Ragen about the police recording the planned questioning, was not reasonably likely to procure an untrue statement. Neither was the police conduct in having Diana call and ask the prepared questions used here, hiding the police involvement, such as to overhear Ragen's will to resist or to bring about confessions not freely self-determined. The situation, being caught and accused by his victim, not deception, caused Ragen to incriminate himself. In terms of self-determination, Ragen did not have to call Diane and could have hung up anytime, taking the consequences of his own sordid criminality. Indeed, he himself placed the second and overwhelmingly incriminating telephone call. Ragen's statements were voluntary.

3) Ragen contends his telephone statements to Diane were inadmissible because before taping them the police did not warn him of his constitutional rights as stated in *Miranda v. Arizona,* 384 U.S. 436 [86 S. Ct. 1602]. Conceding he was not in custody or under arrest is not an indispensable requirement before a *Miranda* warning is required. In *People v. Arnold,* 66 Cal. 2d 438, 448, however, the California Supreme Court adopted the requirement and definition of custody found in *Miranda v. Arizona, supra,* 384 U.S. 436, 444 [86 S. Ct. 1602, 1612]:

> "'By *custodial* interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Italics added.)"

Ragen was not deprived of his freedom of action in any significant way. He could have hung up. He

did not have to call Diane. His statements, therefore, were admissible, considering the totality of circumstances, although he had not been warned of the *Miranda* rights. See *People v. Ing,* 65 Cal. 2d 603, 612-613.

Ragen contends the trial court improperly admitted evidence of his sexual misbehavior with patients other than Diane and Ruth. These vile events occurred as follows:

1) In March 1957, Ragen treated eight months pregnant Mrs. Barnley. A nurse helped Mrs. Barnley onto an examination table. Mrs. Barnley placed her legs in stirrups with her buttucks on the end of the table. In the absence of the nurse, Ragen examined Mrs. Barnley, rubbed his penis up and down in her vaginal area, and, then very forcefully inserted his penis into her vagina.

2) Also in March 1957, Ragen mis-treated 15-year-old, six months pregnant Mrs. Fisher as he had mis-treated Mrs. Barnley, except he never accomplished penetration.

3) Also in March 1957, Ragen mis-treated six to eight months pregnant Mrs. Jenkins as he had Mrs. Fisher.

4) In August 1959, Ragen mis-treated 16-year-old Mrs. Smith for an infection of the cervix. In the absence of a nurse, he had Mrs. Smith get onto the examination table with the stirrups. Ragen gave her an injection, making her relaxed, light-headed and happy. He inserted his penis into her vagina. After blocking her vision with a cloth, he put his penis up to her mouth.

The evidence of Ragen's earlier sexual behavior with patients was admissible. In view of the striking similarities between the offenses charged and the earlier behavior, the evidence proved a common scheme or plan to molest patients, in the absence of a nurse, by getting them onto the examination table with their feet in stirrups and buttocks on the end of the table, rubbing or inserting his penis in their vaginal areas, and, at times, administering intoxicating narcotic or anethestic substance followed by attempting to penetrate or penetrating their mouths with his penis (*People v. Ing, supra,* 65 Cal. 2d 603, 612; *People v. Cramer,* 67 A.C. 121, 125-126). In *People v. Cramer, supra,* 67 A.C. 121, 125-126, the California Supreme Court said:

> "It is settled that evidence of other crimes is ordinarily admissible where it tends to show presence of a common design, plan, or *modus operandi* and we recently recognized in *Kelley, supra,* [*People v. Kelley,* 66 Cal. 2d 232] that this rule applies to sex offenses committed with persons other than the prosecuting witness. We there pointed out that, although charges of sex offenses are often unreliable and particularly difficult to disprove, such evidence is admissible as showing a common scheme or plan where the offenses are not too remote, are similar to the offense charged, and are committed with persons similar to the prosecuting witness. (Citation.) Several decisions have held that the test of admissibility of evidence of another offense offered to prove common design, plan, or *modus operandi* is whether there is some clear connection between that offense and

the one charged so that it may be logically inferred that if defendant is guilty of one he must be guilty of the other. Or as the matter is sometimes stated, the other offenses offered to prove pattern, scheme, or plan are sufficiently similar and possess a sufficiently high degree of common features with the act charged where they warrant the inference that if the defendant committed the other acts he committed the act charged. (Citations.) Other cases have spoken of a 'peculiar or characteristic behavior pattern' (Citations.), 'bizarre details' (Citation.) and 'striking similarities' (Citations.)"

Applying these principles, we hold the trial court properly (1) admitted the evidence of Ragan's earlier sexual conduct with patients, and (2) limited the use of this evidence by instructing as follows:

"Now, let's go back to some of the evidence again. With respect to that evidence offered for the purpose of showing that on occasions other than those mentioned in the indictment, the defendant committed acts upon the bodies of Claudia Barnley, Nancy Jane Fisher, Margaret Jenkins and Lucretia Owings Smith similar to those charged against him in this case, you are not permitted to consider such evidence for the purpose of finding against the defendant district offenses or continued criminality, but you may consider it as tending to show, if you decide that it does tend to show, the disposition of the defendant toward Diane Grace Santa Maria and Ruth Casillas, and an inclination on his part to indulge in the method of sexual gratification involved in the crimes of

which he is charged, and, hence, as having some bearing on the question whether or not the defendant committed the specific offenses of which he is accused in this case. As to such limited purpose for which such evidence may be considered, you will weigh it as you do all of the other evidence in the case."

Ragen contends the trial court's conduct of the trial, including a large number of its rulings, many of which he claims were erroneous, cumulatively prejudiced him. He attacks the following evidentiary rulings:

1) During *voir dire* examination of an investigating policeman to determine the admissibility of the taped telephone conversations, the trial court refused to allow Ragen to inquire whether the police kept him under surveillance after the conversations were taped. Contrary to Ragen's argument, evidence showing surveillance after he made his incriminating statements is irrelevant to the issue whether the police should have warned him of his *Miranda* rights before the conversations. In short, the evidence would not tend to prove earlier custody.

2) On the ground of hearsay, Ragen contends the trial court improperly allowed Diane's father and girl friend to testify what Diane said when she complained on the night Ragen sexually molested her. The trial court properly permitted Diane's father and her girl friend to state what Diane said about the nature of the offense and the identity of the offender, and no more *(People v. Burton,* 55 Cal. 2d 328, 351). The trial court also allowed the jury to hear a tape recording of Diane's complaint to the police. To impeach Diane, Ragen introduced evidence of inconsistencies be-

tween her trial testimony and her taped complaint. He requested the court play most of the tape for the jury. To add needed context, the trial court properly played more of the tape than Ragen wanted (*People v. Watson*, 46 Cal. 2d 818, 827). The trial court, furthermore, instructed the jury to consider the tape solely for impeachment.

3) The trial court refused to allow individual physicians to testify why they excluded nurses during pelvic examinations. Their individual reasons were irrelevant. The trial court properly allowed evidence of a partial community practice to exclude nurses during pelvic examinations.

4) After Ragen introduced Ruth's ex-husband's testimony her reputation for truth and veracity is bad, the trial court permitted the district attorney to ask the ex-husband if Ruth had filed a complaint against him for failure to support their minor child. He answered yes. Because of the exceptional circumstance of the bias toward one of two star prosecuting witnesses, the trial court properly allowed the question (*People v. Vanderburg*, 184 Cal. App. 2d 33).

Continuing his review of the trial court's conduct, attempting to grasp something to compound into prejudice, Ragen contends the instructions to the jury were not perfect:

1) Without evidentiary support, the trial court instructed, as applied, the jury might consider the fact, if it be a fact, that among people knowing Ruth, her truth and veracity had not been discussed. This minute surplusage could not have contributed to prejudice.

2) After giving the usual sex prosecution cautionary instruction regarding the difficulty of defending

against charges easily made, the trial court told the jury, in addition, not to be deterred, however, if convinced beyond a reasonable doubt, from returning a guilty verdict. Ragen's reliance on *People v. Lyons*, 47 Cal. 2d 311, is misplaced. In *Lyons*, the trial court hand-wrote this addition to the printed instructions the jury took with them into the jury room. As *read* here, the addition was proper (*People v Searborough*, 171 Cal. App. 2d 186).

3) The trial court did not instruct the jury might consider Ragen's admissions only if found voluntary. Ragen states he objected to the admission into evidence of his admissions on the ground they were not voluntarily made. The trial court ruled otherwise. Ragen did not put evidence of involuntariness before the jury. The issue, therefore, was properly kept from the jury (*People v. Eli*, 66 Cal. 2d 63, 76).

4) The trial court instructed where a case rests entirely or substantially on circumstantial evidence, each fact compounded into a set of circumstances must be proved beyond a reasonable doubt. Ragen asserts this instruction leaves a jury wondering whether circumstantial evidence must be proved beyond a reasonable doubt if the case does not rest entirely or substantially on circumstantial evidence. The general instruction on reasonable doubt, and all the instructions together here, however, made it clear to the jury the evidence of guilt must be beyond a reasonable doubt.

5) Contrary to Ragen's argument, *People v. Lisenba*, 14 Cal. 2d 403, 431, and *People v. Albertson*, 23 Cal. 2d 550, 579, do not require the sex prosecution other offense instruction to state the evidence of other offenses must be "positive and substantial".

6) Ragen argues the trial court should have defined the word "impeachment" for the jury. This was unnecessary (*People v. Shannon*, 147 Cal. App. 2d 300, 305). The trial court, furthermore, defined impeachment evidence for the jury: "It is evidence which you consider for the purpose of measuring, or testing, or weighing the credibility of a witness. . . ."

Ragen unmeritoriously cites as misconduct the following statements by the trial court while instructing the jury:

> "Parenthetically, sometimes, I think I'm going to organize the instructions under a perfectly marvelous, understandable order so that they flow like the waters of the River Poe—which is in flood again, I understand—but today I guess isn't one of them."

This statement does not support Ragen's speculation the court did not think the instructions were worth the trouble to organize.

> "Now, this is an instruction which, no less than any of the others, you must take account of. But I'm going to read it rather hurriedly because there is one phrase in there which for 22 years has driven me out of my mind as constituting an insult to jurors of decent intelligence and with a sincere approach to their responsibility. I think you will recognize it when I get to it.
>
> "You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number of witnesses, or other evidence or a presumption which does not appeal to your mind with more convinc-

> ing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses simply from caprice or prejudice, or, certainly, from any desire to favor one side as against the other. The rule does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses but in the relative convincing force of the evidence. That's a dandy."

This instruction does not support Ragen's statement the trial court disparaged the importance of instructions. Neither does the quoted language divert attention away from its message, as Ragen asserts.

> "Now, I think I'll read down through these instructions, which define the offenses, and then come back to some other evidentiary matters just to break up the tedium."

This statement, Ragen speculates, means that which went before was unimportant and boring. This simply is unwarranted speculation.

Ragen contends the trial court treated the entire trial with reprehensible levity and prosecution bias. He supplies a long list of allegedly objectionable leading questions asked Diane and Ruth. He does not supply their contexts, the previous answers upon which most of them are based. He parades before us a barrage of reporter's transcript references intending to show trial court bias in ruling on objections to leading questions, questions asked and answered, and, in general, trial court attitude. There is no substance whatsoever

in this treatment, taken mostly out of context from the record. It does not add up to prosecution bias.

Regarding levity, Ragen contends the trial court's remarks worked to "dull the edge of advocacy, distract concentration on the business in hand, and dilute the seriousness and solemnity in and with which any important trial should be conducted." We believe all trials deserve the attributes Ragen erroneously complains his trial lacked.

During his first instruction to the jury not to discuss the case before it was submitted to them, the trial court remarked:

> "Well, the reason you are not to discuss the case, or the witnesses, or the testimony, or the exhibits, or the neckties of the lawyers, or the haircut of the judge, is this: We want taken into the jury room for deliberation, after all of the evidence is in, after all of the instructions have been given, twelve independent views of the evidence."

Toward the end of the case the trial court told the jury:

> "I have told counsel that because of the length of the matter I would give them one day free to prepare for argument and discussion. If things go forward in that fashion without some unexpected jolt, we might then finish today with the testimony, take Tuesday away from the case, Wednesday resume for argument and instructions. I would not send you out at the close of a full day of argument and instructions. You will be ready to climb the walls after you have sat all day listening to me and to the lawyers. So, it's

possible that you may begin your responsibility in the case Thursday morning."

After both sides rested the court told the jury:

"Well, I won't ask counsel to jump up and start discussing the case with you this afternoon.

"I think if we give them tomorrow to work on it, they'll be able to boil it down a little bit, and we won't have to listen to so much. I shouldn't really joke about it, I suppose, because actually I'm sure that after a long trial as this one has been, you will find both counsels' remarks very helpful to you. And the more study they can put in on their review, the more help we'll all get."

These examples typify Ragen's citations of alleged trial court levity. In context, without Ragen's briefed exaggerations, the citations do not prove jocular misconduct. This was a long trial seriously conducted with dignity. Defense counsel, district attorney and court occasionally spliced flecks of humor into the trial, not detracting, however, from its serious purpose.

Judgment affirmed.

Gerald Brown, *P. J.*

I Concur:

Coughlin, *J.*

Whelan, *J.*, deeming himself disqualified, did not participate in this case.

APPENDIX II.

Proceedings Relating to Raising the Federal Questions in the Trial Court.

"[THE COURT:] I think the record might reflect that court and counsel are going to listen to a tape recording, which will become a People's exhibit for identification, principally, I guess, to verify the accuracy of a written transcription of the tape which I understand is also here.

Do you wish to add anything?

MR. ENRIGHT: [Petitioner's counsel] No, I think that's accurate. There is a transcription in the Grand Jury transcript, but since I think the way to compare the tape with the transcript would be to use that transcript which is proposed to be shown to the jurors, if the Court overrules my objection.

THE COURT: Yes. The record might also show here, I believe, that Court and counsel in an informal session have arrived at this decision: The Court, voluntarily, and at least one of counsel by necessity, that assuming the admissibility of the tape and the transcript, the transcript will be made available in copy form to the jurors during the playing of the tape. But the transcript will not be sent into the jury room with them.

MR. ENRIGHT: And I would appreciate if the Court overrules my objection, that at the conclusion of the playing of the tape that the transcripts be picked up. In other words—

THE COURT: Yes, understood." [Rep. Tr. (I), p. 215, line 3, to p. 216, line 1.]

* * *

"MR. WADDELL: [Prosecution Counsel] . . .

"The evidence is then going to indicate that at the police department's direction, the law enforcement's direction, Diane Grace Santa Maria was directed to call Dr. Ragen on the telephone the next day. She was directed to ask certain questions and the telephone conversation between Dr. Ragen on the next day, May the 27th, 1966, and the conversation with Diane Grace Santa Maria was then and there recorded by the police department and will be evidence in this case.

The tape recording will disclose, in essence—

MR. ENRIGHT: Now, at this juncture, your Honor, I would like to—there's no question of it—I would like to preserve what I felt was our discussion prior to this time in connection with the evidence about to be mentioned.

THE COURT: Your position may be retained without any prejudice from failure to renew it and may be considered a continuing objection throughout the case.

Go ahead—

MR. ENRIGHT: Thank you.

THE COURT:—Mr. Waddell." [Rep. Tr. (I), p. 227, line 15; p. 227, line 24, to p. 228, line 17.]

* * *

"MR. WADDELL: Of course, now I'm awaiting arrival of the tape itself, your Honor, which I'm going to have as People's next in order. Mr. Woods just informed me it was locked in his desk so he's on his way up to get it, your Honor.

THE COURT: All right, it will become People's 5 for identification, a tape.

MR. WADDELL: This tape, your Honor, purports to be conversations related to in the witness' testimony as to having occurred between her and Dr. Ragen on May the 27th.

Your Honor, while we're waiting for Mr. Woods to bring the tape in, I would ask that Sergeant Gardner from the Chula Vista Police Department set it up so we can get ready to play it when the time comes and perhaps in an effort to save time unless you want to follow it.

THE COURT: Let's mark it, offer it, and then I'll take the discussion of counsel.

(Mr. Woods entered courtroom.)

MR. WADDELL: All right. People ask this tape box and its contents, one tape, be marked People's next in order as 5, your Honor, is that right?

THE COURT: Yes.

(The box and tape were marked People's Exhibit Number 5, for identification.)"

"MR. WADDELL: All right. That's all the foundational questions I have. People will offer 5 for purposes of hearing.

THE COURT: Anything on foundation?

MR. ENRIGHT: Yes, if I could.

VOIR DIRE EXAMINATION OF DIANE GRACE SANTA MARIA: BY MR. ENRIGHT:" [Rep. Tr. (II), p. 331, line 15, to p. 332, line 13; p. 332, line 25, to p. 333, line 6.]

* * * * *

"THE COURT: I assume from the state of the record, prior to the noon recess, Mr. Enright, that

you have no further evidence to present on the foundational problem with respect to People's 5 for identification?

MR. ENRIGHT: None other at this time, your Honor. The only other thing I could think of that I would appreciate if the Court could reserve for the point that we have discussed, by way of the voice print sample. Counsel has suggested that that be done after the testimony of Miss Santa Maria and, of course—

THE COURT: Yes. Any admissible evidence relating to the validity, mechanical or otherwise, of People's 5 can be taken when it's available.

I would say in connection with the argument you propose to make, Mr. Enright, for the record, that in addition to such arguments as you may now wish to present in somewhat summary form, that Court and counsel have to some extent, debated this issue informally in chambers. And the record may further reflect that the jury is still, of course, absent from the courtroom. All right.

MR. ENRIGHT: The points that I would raise for the Court's consideration in connection with the admissibility of the tape are really four distinct positions. . . ."

". . . And, in effect, when Dr. Ragen was talking with Diane Santa Maria, he was talking directly with an agent of the District Attorney's office since she was proceeding at his request, at his suggestion, and following a specific pattern of questioning that he had outlined. So, I think that, in effect, Dr. Ragen was talking directly to the District Attorney when the inquiry had certainly focused upon him."

"The same set of facts, I think are equally appropriate to the second point, which would be the application of the Dorado, Escobedo and Miranda rule in that a warning should have been given to Dr. Ragen. I think the same factual situation applies, and I know that the Court is concerned with the ruling or the holding in People vs. Ballard, which is 64 A.C. at page 164, as I recall, decided in March of this year.

"THE COURT: It's a little earlier than that in the volume I believe.

MR. ENRIGHT: I had it as March 4.

THE COURT: Oh, go ahead.

MR. ENRIGHT: It would seem that that case held that in the absence of custody, the accusatory stage could not have been—could not have matured. And, therefore, they held the Dorado and Escobedo doctrine wasn't applicable.

I would like to cite to the Court that since that case People vs. Ing, which seems to be closer to our factual situation than Ballard, was decided at 242 A.C.A. at page 261. That case relied in the taking of a tape on the authority of Ballard. That case now has been petitioned to the Supreme Court for hearing, and the Supreme Court has granted a hearing. As yet, we do not know on what basis, but I'm satisfied from a reading of the case that Ing was decided solely and squarely on the Ballard principle. And the factual situation in Ing is closer to ours than Ballard, and since a rehearing has been granted by the same court it may be, as I said, that the law is in a state of flux in that regard.

I would suggest to the Court that our case is different from Ballard, and I would cite to the Court as

authority for that, Massiah, which was discussed in Ballard where custody was not a requisite, when they held this, that secret interrogation of the defendant should not be admitted in evidence. I would also cite to the Court the discussion held in People vs. Stewart, 62 Cal. 2d 571, wherein the Court suggests that in making a decision on the admissibility, you must look to the entire set of circumstances surrounding the interrogation.

But, more specifically, People vs. Jones, 47 Cal. Reporter at Page 40. In that case, the Court may recall, a juvenile was turned in by his mother in connection with marijuana that was found in his room. He made a statement to the police that the defendant had given it to him. He was then instructed by the police to call the defendant and inquire of him certain statements which led to what was purported to be an admission or confession, which was introduced against him. In that case, the defendant conceded that he was not in custody at the time of the interrogation, and the People said that that was enough to prevent the application of the Dorado case. The Court held, 'however, as People vs. Stewart indicates, the accusatory process may be undertaken either before or after an arrest. We must look to the whole situation.'

In that case, after considerable discussion, the Court held—which I think delineates our case from theirs—'understandably the police didn't choose to take the defendant into custody solely on the basis of the juvenile's statement.'

Here we have much more than that. We have the charge made, a tape recording made of the victim's statement. We have corroboration, to some extent, of

her story by the hospital examination, and we have the District Attorney's testimony this morning that at that time, before the tapes were made, he had in good faith reasonable cause to believe that a complaint could issue based upon her testimony and her statement.

And, secondly, in the Jones case they delineated it because they said no process of interrogation designed to elicit incriminating statements had begun. This was a voluntary series of statements made to me and during a conversation with a juvenile.

Here we don't have that. Here we have a prepared, specific list of questions in areas that could be explored and should be explored and were, in fact, the only things explored during the course of the conversation.

So, my position is this, based upon Massiah, that there is an artificial distinction to require physical custody by the fact a District Attorney can gather his evidence and then by the simple process of delaying the arrest—delaying the arrest call forth the incriminatory statements without any warning under Escobedo and Dorado and thwart the purposes of that law. Certainly, I think if a defendant is not aware of the charge, he should be warned. Here there is no indication, whatsoever, that this man was aware of the changes that were pending at the time. The police were aware of them, and he certainly would be much more entitled and in need of the warning that seems to be required under Escobedo and Dorado, so I would ask the Court to consider the Massiah case as authority for the proposition that this tape should be excluded from evidence because it did not comply with the requisite of Escobedo and Dorado, and based upon delineations we don't find in the Jones case.

I think that, essentially, is my position relative to the warning that should have been given. Those are the two major points that I would raise: That the custody requirement is an artificial distinction, which I think may well be the reason that the Supreme Court has now granted a hearing in the Ing case. In the Ing case, as I recall, an actual warrant of arrest was in the hands of the officers when they taped the recording made by the alleged victim, when she called the doctor. And I think that the Court will now, possibly, further refine the rule but certainly here we have probable cause existing in the mind of the Deputy who, ultimately, handled the case and was in charge of it, at that time.

So, that's our position the tape, your Honor, with those cases. . . ."

"We're concerned, also, the third point, the authenticity of the tape on which I would like the Court to reserve a ruling. I was concerned, also, whether the recording itself, by the fact of recording, whether or not that conformed with all the requirements of Federal and State law, but all the cases I have been able to find on it would seem that it does—at least at this time—and I would cite to the Court in that regard People vs. Fontaine, 237 Cal. App. 2d at page 320 . . ."

"That, essentially, is the defendant's position relative to the tape, your Honor." [Rep. Tr. (II), p. 391, line 5, to p. 398, line 25.]

* * * * *

"(The following proceedings were had in open court in the presence and hearing of the jury.)

THE COURT: I would only say to you, ladies and gentlemen, that sometime during the course of this trial I'm going to try to do something nice for you. Now, then you have a motion that has either been made and not ruled on or not made.

MR. WADDELL: People would move to admit People's 5 for identification in evidence, your Honor, for the purpose of playing that particular exhibit at this time.

THE COURT: The usual comment for the record that defense counsel's position on the matter is clear and continuing.

MR. ENRIGHT: Thank you.

THE COURT: People's Exhibit 5 will be received.

(The tape recording previously marked People's Exhibit Number 5, for identification, was received in evidence.)"

[Rep. Tr. (II), p. 404, lines 6-23.]